

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JOSE ALVAREZ-ABREGO,

Petitioner,

v.

JEFF UTTECHT,

Respondent.

No. C10-5543 RBL/KLS

**REPORT AND RECOMMENDATION**  
**Noted for: February 4, 2011**

This case has been referred to United States Magistrate Judge Karen L. Strombom pursuant to Title 28 U.S.C. § 636 (b) (1) and Local MJR 3 and 4. Petitioner Jose Alvarez-Abrego filed a 28 U.S.C. § 2254 habeas corpus petition relating to his 2008 conviction of second degree assault of a child. ECF No. 7; ECF No. 20, Exh. 1. Respondent filed a response and the relevant state court record. ECF Nos. 19 and 20. Having carefully considered the parties' filings and relevant record, the undersigned recommends that the petition be denied and this action dismissed with prejudice.

**BACKGROUND**

**A. Factual Background**

On June 10, 2008, Mr. Alvarez-Abrego was found guilty by jury verdict of one count of second degree assault of a child. ECF No. 20, Exh. 1. He was sentenced on July 23, 2008 to 54 months confinement.<sup>1</sup> *Id.*, Exh. 1 at 6.

<sup>1</sup> An immigration detainer has been placed upon Mr. Alvarez-Abrego, which subjects him to possible removal from the United States by the U.S. Department of Homeland Security following his release from the institution. *See* ECF

1 The Washington Court of Appeals summarized the facts underlying Mr. Alvarez-  
2 Abrego's conviction as follows:

3 On August 29, 2007, at approximately 1:30 PM, Kristina Rondeau left her  
4 apartment in Centralia, Washington, with her 10 year old son, BEC, for a doctor's  
5 appointment.<sup>2</sup> Rondeau's boy friend, Alvarez-Abrego, periodically lived with her  
6 and often cared for the children while she was away. That afternoon, Rondeau  
7 left her four other children, including her four year old daughter RRR and six  
8 month old son MJS, in Alvarez-Abrego's care. RRR was the oldest child  
9 remaining at the apartment. No other adults were present and MJS was uninjured  
10 when Rondeau left.

11 Between 6:00 and 6:30 PM, Rondeau returned home and saw MJS  
12 sleeping in his baby seat. She told Alvarez-Abrego to accompany her to the store.  
13 At that point, "[Alvarez-Abrego] grabbed [MJS] and put him in the stroller and  
14 went downstairs real fast" while she readied the other children. Report of  
15 Proceedings (RP) (June 9, 2008) at 79-80. Alvarez-Abrego pushed MJS in the  
16 stroller on their way to and from the store. Rondeau thought that Alvarez-Abrego  
17 was acting unusually attached to MJS.

18 When they returned to the apartment, Rondeau noticed that the side of  
19 MJS's head was swollen behind his left ear. Rondeau immediately took MJS to a  
20 neighbor who drove them to the Centralia hospital. Hospital staff determined to  
21 transfer MJS to Mary Bridge Children's Hospital in Tacoma.

22 At Mary Bridge, Dr. Yolanda Duralde examined MJS twice over the  
23 period of several hours. She determined that MJS had suffered a complex skull  
24 fracture behind his left ear and that he had significant bleeding under his scalp.  
25 Duralde also diagnosed a healing fracture to MJS's rib and chip fractures to his  
26 wrist and ankles. Rondeau told her that RRR said that Alvarez-Abrego had  
27 thrown MJS against the wall.

28 While Rondeau and MJS were at the hospital, Centralia Police Officer  
29 Ruben Ramirez interviewed Alvarez-Abrego at the apartment. Ramirez asked if  
30 Alvarez-Abrego knew what had happened to MJS. Alvarez-Abrego responded  
31 that, earlier the previous day, while he was putting on shoes and socks in the  
32 bedroom, he heard MJS begin to cry. When Alvarez-Abrego found MJS, he was  
33 on the carpet with his siblings, crying. Alvarez-Abrego also told Ramirez that he  
34 took MJS and the other children to the store while Rondeau was away but that he  
35 did not see anything happen to MJS.

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36 No. 20, Exh. 1(a). His current earned release date from the Washington Department of Corrections is December 18, 2010, while his planned release date is December 8, 2010. *See* ECF No. 20, Exh. 1(b).

1 Centralia Police Officer Carl Buster arrested Alvarez-Abrego. When  
2 Buster asked Alvarez-Abrego if he had thrown MJS against the wall, Alvarez-  
3 Abrego paused and then in a soft voice denied throwing MJS. Alvarez-Abrego  
4 suggested that one of the other children may have caused MJS's injuries.

5 The State charged Alvarez-Abrego with second degree child assault by  
6 either (1) "recklessly inflicting substantial bodily harm" or (2) "caus[ing] bodily  
7 harm that was greater than transient physical pain or minor temporary marks"  
8 after "having previously engaged in a pattern or practice of either assaulting the  
9 child which had resulted in bodily harm that was greater than transient pain or  
10 minor temporary marks, or causing the child physical pain or agony that was  
11 equivalent to that produced by torture." Clerk's Papers at 92-93; *see* RCW  
12 9A.36.130(1)(b).

13 <sup>2</sup> We refer to child victims and witnesses by their initials to protect their rights as  
14 minors under RCW 7.69A.030(4). [Footnote by the Court.]

15 ECF No. 20, Exh. 7, pp. 2-3.

## 16 **B. Procedural Background**

17 Counsel for Mr. Alvarez-Abrego filed a notice of appeal of his superior court judgment  
18 and sentence to the Washington Court of Appeals, Division II. ECF No. 20, Exh. 2. Through  
19 counsel Mr. Alvarez-Abrego filed a brief of appellant in the Washington Court of Appeals. *Id.*,  
20 Exh. 3. Mr. Alvarez-Abrego filed a pro se statement of additional grounds for review. *Id.*, Exh.  
21 4. Respondent State of Washington filed a brief in response. *Id.*, Exh. 5. The Washington Court  
22 of Appeals affirmed the judgment and sentence. On October 12, 2009, Respondent State of  
23 Washington filed a statement of additional authorities. *Id.*, Exh. 6.

24 Mr. Alvarez-Abrego filed a petition for review in the Washington Supreme Court. *Id.*,  
25 Exh. 8. On June 2, 2010, the Washington Supreme Court denied the petition for review. *Id.*,  
26 Exh. 9. The Washington Court of Appeals issued a mandate on July 26, 2010. *Id.*, Exh. 10.

## ISSUES FOR FEDERAL HABEAS REVIEW

Mr. Alvarez-Abrego presents three issues for federal habeas review:

- 1) The trial court denied the defendant his right to due process under Washington Constitution, Article 1, § 3, and under United States Constitution, Fourteenth Amendment when it entered judgment against him for second [degree] assault of a child because this connection was not supported by substantial evidence.
- 2) The trial court erred when it admitted third-party hearsay under ER 803(a)(4) “statement for purpose of medical diagnosis and treatment” exception because the statements admitted were not reliable and were not given for the purpose of diagnosis or treatment.
- 3) The trial court violated the defendant’s right to confrontation under Washington Constitution, Article 1 § 22, and United States Constitution, Sixth Amendment when it admitted testimonial statements of a non-witness to prove an element of the crime.

ECF No. 7, pp. 5, 7-8.

## EXHAUSTION

There is no dispute that Mr. Alvarez-Abrego’s claims are exhausted. ECF No. 18, p. 6.

## EVIDENTIARY HEARING

Evidentiary hearings are not usually necessary in a habeas case. According to 28 U.S.C. § 2254(e)(2) (1996), a hearing will only occur if a habeas applicant has failed to develop the factual basis for a claim in state court, and the applicant shows that: (A) the claim relies on (1) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable, or if there is (2) a factual predicate that could not have been previously discovered through the exercise of due diligence; and (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense. 28 U.S.C. § 2254(e)(2) (1996).

1 Petitioner's claims rely on established rules of constitutional law. Further, there are no  
2 factual issues that could not have been previously discovered by due diligence. Finally, the facts  
3 underlying Petitioner's claims are insufficient to establish that no rational fact finder would have  
4 found him guilty of the crime. Therefore, this court concludes that an evidentiary hearing is not  
5 necessary to decide this case.

#### 6 STANDARD OF REVIEW

7  
8 Federal courts may intervene in the state judicial process only to correct wrongs of a  
9 constitutional dimension. *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1983).  
10 Section 2254 explicitly states that a federal court may entertain an application for writ of habeas  
11 corpus "only on the ground that [the petitioner] is in custody in violation of the constitution or  
12 law or treaties of the United States." 28 U.S.C. § 2254(a) (1995). The Supreme Court has stated  
13 many times that federal habeas corpus relief does not lie for mere errors of state law. *Estelle v.*  
14 *McGuire*, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *Lewis v. Jeffers*, 497 U.S. 764,  
15 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990); *Pulley v. Harris*, 465 U.S. 37, 41, 104 S.Ct. 871, 79  
16 L.Ed.2d 29 (1984).

17  
18 A habeas corpus petition shall not be granted with respect to any claim adjudicated on the  
19 merits in the state courts unless the adjudication either: (1) resulted in a decision that was  
20 contrary to, or involved an unreasonable application of, clearly established federal law, as  
21 determined by the Supreme Court; or (2) resulted in a decision that was based on an  
22 unreasonable determination of the facts in light of the evidence presented to the state courts. 28  
23 U.S.C. § 2254(d). A determination of a factual issue by a state court shall be presumed correct,  
24 and the applicant has the burden of rebutting the presumption of correctness by clear and  
25 convincing evidence. 28 U.S.C. § 2254(e)(1).  
26

## DISCUSSION

### A. Claim One - Insufficient Evidence

In his first claim for federal habeas relief, Mr. Alvarez-Abrego asserts that there was insufficient evidence to find him guilty of second degree assault of a child. ECF No. 7, p. 5. When evaluating a claim of insufficiency of the evidence to support a conviction, the question is not whether the court itself believes the evidence establishes guilt. “Instead, the relevant question is whether . . . any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis original). The court must “view the record as a whole in the light most favorable to the prosecution.” *Gordon v. Duran*, 895 F.2d 610, 612 (9th Cir.), cert. denied, 489 U.S. 1077 (1990).

The court’s review is limited to “record evidence.” *Herrera v. Collins*, 113 S. Ct. 853, 861 (1993). Review is sharply limited and the court owes great deference to the trier of fact. *Wright v. West*, 112 S. Ct. 2482, 2492, (1992). A sufficiency of evidence review is undertaken with reference to the elements of the criminal offense as set forth by state law. *Jackson*, 443 U.S. at 324 n. 16. Mr. Alvarez-Abrego’s conviction is now presumptively lawful and the burden is on him in this § 2254 proceeding to establish that (1) no rational trier of fact could have found the elements of the crime beyond a reasonable doubt, in accordance with the *Jackson v. Virginia* standard, and (2) that the Washington Court of Appeals’ adjudication of his *Jackson* claim was either contrary to or an unreasonable application of *Jackson*, for purposes of § 2254(d).

Mr. Alvarez-Abrego was convicted of the crime of assault of a child in the second degree under RCW 9A.36.130(1)(a)(1)(b), as charged in the State’s Amended Information.

1 ECF No. 20, Exh. 1 at 1 and Exh. 11. RCW 9A.36.130 defines assault of a child in the second  
2 degree as follows:

3 (1) A person eighteen years of age or older is guilty of the crime of assault of a  
4 child in the second degree if the child is under the age of thirteen and the person:

5 (a) Commits the crime of assault in the second degree, as defined in RCW  
6 9A.36.021, against a child; or

7 (b) Intentionally assaults the child and causes bodily harm that is greater  
8 than transient physical pain or minor temporary marks, and the person has  
9 previously engaged in a pattern or practice either of (i) assaulting the child which  
10 has resulted in bodily harm that is greater than transient pain or minor temporary  
11 marks, or (ii) causing the child physical pain or agony that is equivalent to that  
12 produced by torture.

13 RCW 9A.36.130. Mr. Alvarez-Abrego was charged by the State under both alternatives to  
14 RCW 9A.36.130. ECF No. 20, Exh. 11.

15 Mr. Alvarez-Abrego does not state how or in what manner his conviction was not  
16 supported by substantial evidence. ECF No. 7, p. 5. He has included no facts supporting his  
17 claim that he was denied due process when the trial court “entered judgment against him for  
18 second [degree] assault of a child because this conviction was not supported by substantial  
19 evidence.” *Id.* Because Mr. Alvarez-Abrego failed to state any facts in support of this habeas  
20 claim, this claim may be summarily denied based on a failure to comply with Rule 2(c)(2) of  
21 the Rules Governing § 2254 Cases, which requires that a habeas petitioner state the facts  
22 supporting each ground for relief in the petition. *See id.*

23 When he litigated this claim in the Washington Court of Appeals, Mr. Alvarez-Abrego  
24 specifically alleged that his conviction was not supported by substantial evidence because not a  
25 single witness claimed to know his age (where one of the elements of the crime of assault of a  
26

1 child in the second degree is that the defendant must be 18 years of age or older). ECF No. 20,  
2 Exh. 3, pp. 10-16.

3 The trial court admitted Mr. Alvarez-Abrego's identification card, which had a birth  
4 date of April 12, 1971. It was alleged that Mr. Alvarez-Abrego committed his crime of assault  
5 of a child in the second degree on August 29, 2007. ECF No. 20, Exh. 11. Therefore, the  
6 identification card indicated that Mr. Alvarez-Abrego was 36 years of age at the time of the  
7 assault. ECF No. 13, Verbatim Report of Proceedings of June 9, 2008, pp. 108-109:  
8

9 BY MR. HAYES:

10 Q Handing you what's marked as state's Identification No. 3, can you take a  
11 look at that and tell me what it is?

12 A This is a – what appears to be a – a letter from a records custodian from  
13 the Department of Licensing, certifying that this photo is a record of Jose  
14 Alvarez-Abrego, and it's a copy of his identification card, Washington  
15 identification card.

16 Q What's the birthday on that –

17 MR. MEYER: Objection; relevance.

18 THE COURT: Overruled.

19 A April 12<sup>th</sup> of 1971.

20 MR. HAYES: Your Honor, State moves to admit Identification 3.

21 MR. MEYER: Voir Dire?

22 THE COURT: Go ahead.

23 MR. MEYER: You have absolutely no idea as to the accuracy of  
24 that record, do you?

25 THE WITNESS: Only what the records custodian is certifying here.

26 MR. MEYER: But you don't know if it's true or not? You don't  
know if the information contained on there is accurate?



1 THE WITNESS: On which part?

2 MR. MEYER: On the picture part.

3 THE WITNESS: No, I have no idea.

4 MR. MEYER: Foundation.

5 THE COURT: Overruled. It's certified, is it not?

6 MR. HAYES: It is.

7 THE COURT: Is it sealed?

8 MR. HAYES: Yes.

9 THE COURT: It's admissible by statute.

10 MR. MEYER: I agree.

11 THE COURT: Identification 3 is admitted as Exhibit 3.

12 ECF No. 13, pp. 108-109

13 At trial, the court instructed the jury as to the elements of the crime of assault of a child  
14 in the second degree, including the element that the defendant must be 18 years of age or older,  
15 and that the victim was under the age of 13. ECF No. 20, Exh. 12. In its opinion affirming Mr.  
16 Alvarez-Abrego's conviction, the Washington Court of Appeals held that the evidence was  
17 sufficient to establish the elements of the charged offense under Washington law:  
18  
19  
20

21 II. SUFFICIENCY OF EVIDENCE

22 During Buster's direct examination, the trial court admitted Alvarez-  
23 Abrego's Washington identification card, including his picture and date of birth,  
24 over the defense's foundation objection. Alvarez-Abrego contends that the State  
25 failed to prove one of the statutory elements of second degree child assault under  
26 RCW 9A.36.130(1) – that he was at least 18 years old. Specifically, Alvarez-  
Abarego claims that the admission of a certified copy of a state identification card  
for a person named Jose Alvarez Abrego, born in 1971, was insufficient evidence

1 of his age because no witnesses testified that the defendant was the same person  
2 shown on the card. We disagree.

### 3 A. Standard of Review

4 When reviewing a challenge to the sufficiency of the evidence, we  
5 determine whether any rational fact finder could have found the essential  
6 elements of the charged crime beyond a reasonable doubt, viewing the trial  
7 evidence in the light most favorable to the State. *State v. Brockob*, 159 Wn.2d  
8 311, 336, 150 P.3d 59 (2006). An insufficiency claim also admits all inferences  
9 that a fact finder can reasonably draw from the evidence. *State v. Salinas*, 119  
10 Wn.2d 192, 201, 829 P.2d 1058 (1992).

### 11 B. Sufficient Evidence of Second Degree Child Assault

12 In every criminal prosecution, the State must prove each element of the  
13 crime charged beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364,  
14 90 S. Ct. 1068, L. Ed. 2d 368 (1970). We treat direct and circumstantial evidence  
15 as equally reliable and we defer to the trier of fact on issues of conflicting  
16 testimony, witness credibility, and persuasiveness of the evidence. *State v.*  
17 *Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); *State v. Walton*, 64 Wn. App.  
18 410, 415-16, 824 P.2d 533 (1992).

19 Here, the State presented sufficient evidence that the Jose Alvarez-Abrego  
20 whose birthday was April 12, 1971, was the same Jose Alvarez-Abrego on trial.  
21 During Buster's direct testimony, the State introduced Exhibit 3, a certified copy  
22 of a Washington State Identification Card, complete with color photograph. After  
23 testifying about his interview with Alvarez-Abrego, Buster stated that the exhibit  
24 "appears to be a -- a letter from a records custodian from the Department of  
25 Licensing, certifying that this photo is a record of Jose Alvarez-Abrego, and it's a  
26 copy of his identification card, Washington identification card." Buster read the  
birth date listed on the card as "April 12th of 1971." RP (June 9, 2008) at 108.  
The trial court overruled the defense's foundation objection, ruling that the  
certified record was admissible by statute.

The jury could compare this photograph to Alvarez-Abrego. Based on this  
evidence, taken in the light most favorable to the State, it was sufficient to support  
the jury's verdict. Thus, we hold that this evidence was sufficient to allow any  
rational juror to determine beyond a reasonable doubt that Alvarez-Abrego was at  
least 18 years old.<sup>3</sup>

<sup>3</sup> Alvarez-Abrego cites *State v. Hunter*, 29 Wn. App. 218, 627 P.2d 1339 (1981),  
to argue that the State needs additional evidence confirming that the card  
belonged to Alvarez-Abrego beyond Buster's tacit recognition that the picture  
matched the defendant. But the *Hunter* court held instead that "[w]here a former

1 judgment is an element of the substantive crime being charged, identity of names  
2 alone is not sufficient proof of the identity of a person to warrant the court in  
3 submitting to the jury a prior judgment of conviction.” 29 Wn. App. at 221. We  
distinguish this case based on, among other things, the color photograph  
connecting the document to the defendant. [Footnote by the court.]

4 ECF No. 20, Exh. 7, p. 20.

5 As noted above, the relevant question is whether any rational trier of fact could have  
6 found the essential elements of the crime beyond a reasonable doubt. *Jackson*, 443 U.S. at 319.  
7 Viewing the record as a whole in the light most favorable to the prosecution, the undersigned  
8 finds that the Washington Court of Appeals’ decision was not contrary to or an objectively  
9 unreasonable application of clearly established law. There was admissible evidence in the form  
10 of a certified copy of a state identification card with a color photo of Jose Alvarez-Abrego. The  
11 trial court found, and defense counsel agreed, that such evidence was admissible under  
12 Washington statute.<sup>2</sup> It is also noteworthy that Mr. Alvarez-Abrego is not challenging the  
13 accuracy of the information contained in the identification card. The Washington Court of  
14 Appeals concluded that a jury could compare the photograph with the Jose Alvarez-Abrego on  
15 trial. This was not an objectively unreasonable determination of the facts in light of the evidence  
16 presented.  
17

18  
19 Mr. Alvarez-Abrego is not entitled to habeas relief on this claim. The undersigned  
20 recommends that Mr. Alvarez-Abrego’s first claim for habeas relief be denied and dismissed  
21 with prejudice.  
22

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23 <sup>2</sup> RCW 5.44.040 (certified copies of public records may be admissible as an exception to hearsay  
24 rule); *State of Washington v. [C.N.H.], B.D.*, 90 Wash. App. 947, 954 P.2d 1345 (1998)(certified  
25 copy of Washington state-issued identification card was admissible as evidence of defendant’s  
26 age under hearsay exception for public records). Although not applicable to state court  
proceedings, the federal rules of evidence similarly allow the admission of certified copies  
without extrinsic evidence of authenticity and regardless of the declarant’s availability to testify.  
*See*, Fed. R. Evid. 902(4) and Fed. R. Evid. 803(8).

**B. Claims Two and Three – Admission of Third-Party Hearsay Under 803(a)(4)**

In his second claim for federal habeas relief, Mr. Alvarez-Abrego asserts that the trial court erred when it admitted third-party hearsay under ER 803(a)(4) “statement for purpose of medical diagnosis and treatment” exception because the statements admitted were not reliable and were not given for the purpose of diagnosis or treatment. ECF No. 7, p. 7. In his third claim for federal habeas relief, Mr. Alvarez-Abrego asserts that the trial court violated his Sixth Amendment right to confrontation when it admitted testimonial statements of a non-witness to prove an element of the crime. ECF No. 7, p. 8. Mr. Alvarez-Abrego presents no facts supporting these claims. Thus, they can be summarily denied based on a failure to comply with Rule 2(c)(2) of the Rules Governing § 2254 Cases, which requires that a habeas petitioner state the facts supporting each ground for relief in the petition. *See id.*

When he raised these issues in the Washington courts of appeal, Mr. Alvarez-Abrego complained that RRR’s statement to Kristina Rondeau that Mr. Alvarez-Abrego had thrown six-month old MJS against the wall, was hearsay, it was erroneously admitted under ER 803(a)(4) because the statements were not made for purposes of medical diagnosis or treatment, and admission of the statement violated his Sixth Amendment right to confrontation. ECF No. 20, Exhs. 3 and 8.

**1. Inadmissible Hearsay**

Petitioner’s second claim fails for two reasons. First, the Washington Court of Appeals agreed with Mr. Alvarez-Abrego that ER 803(a)(4) did not permit double hearsay of an uninjured declarant and that the trial court had erred in admitting statements as double hearsay from an uninjured declarant under ER 803(a)(4). ECF No. 20, Exh. 7, pp. 12-16. Second, federal habeas relief is not available for errors of state law only. *See* 28 U.S.C. § 2254(a); see

1 also *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) (“In  
2 conducting habeas review, a federal court is limited to deciding whether a conviction violated the  
3 Constitution, laws, or treaties of the United States.”); *Smith v. Phillips*, 455 U.S. 209, 221, 102  
4 S.Ct. 940, 71 L.Ed.2d 78 (1982) (“A federally issued writ of habeas corpus, of course, reaches  
5 only convictions obtained in violation of some provision of the United States Constitution.”).  
6 Specifically, state evidentiary rulings are not cognizable in a federal habeas proceeding unless  
7 federal constitutional rights are affected. *McGuire*, 502 U.S. at 68; *Gordon v. Duran*, 895 F.2d  
8 610, 613 (9th Cir.1990).  
9

10 Thus, to the extent Petitioner argues that the hearsay testimony was admitted in violation  
11 of Washington’s evidentiary rules, his claims do not present federal questions and are not  
12 cognizable on federal habeas review.

## 13 **2. Violation of Confrontation Clause**

14 To the extent Petitioner is claiming that the admission of the hearsay testimony violated  
15 his Sixth Amendment right to confrontation, his claim fails because the Washington Court of  
16 Appeals reasonably determined that admission of the evidence was harmless.  
17

18 The Washington Court of Appeals concluded that admission of RRR’s statements  
19 violated the Confrontation Clause. ECF No. 20, pp. 8-11. The court then turned to the question  
20 of whether the admission of RRR’s statements was nevertheless harmless:  
21

22 Here, aside from Duralde’s constitutionally flawed hearsay testimony, the  
23 State has established overwhelming untainted evidence of Alvarez-Abrego’s guilt.  
24 MJS was injury free when Rondeau left him in Alvarez-Abrego’s care that  
25 afternoon. When Rondeau returned, Alvarez-Abrego concealed MJS from her by  
26 grabbing and keeping him in the stroller during their trip to the store. There is no  
evidence that Alvarez-Abrego told Rondeau that MJS fell while Alvarez-Abrego  
was putting on his shoes in the bedroom or that he discovered the injuries  
following that purported fall. Rondeau noted that Alvarez-Abrego was acting in  
an unusual manner toward MJS when she returned but she did not ask to see or

1 hold MJS until they returned to the apartment from the store. When she finally  
2 saw MJS, his head was grossly swollen, pushing his scalp away from his skull and  
3 changing the placement of his left ear. Additionally, Rondeau's oldest child  
4 verified that Alvarez-Abrego would swing MJS around by his ankles when  
5 Rondeau was away. And their neighbor heard MJS give a sickly, painful cry that  
6 quickly stopped, something she had never heard him do before.

7 The medical evidence supported this testimony and pointed singularly to  
8 an assault by an adult. MJS suffered a complex fracture to his skull caused by a  
9 significant blunt force trauma. There was evidence that prior child abuse had  
10 caused fractures to his wrist, ankles, and rib. Duralde testified that MJS's injuries  
11 "were consistent with someone hurting him as opposed to having experienced  
12 accidental injury"; thus, disregarding her ultimate conclusion that "the history that  
13 fit[ ] his injury was that he had been thrown against the wall," the overwhelming  
14 evidence shows that, as sole caretaker during Rondeau's absence, Alvarez-Abrego  
15 caused the trauma to MJS. RP (June 9, 2008) at 40-41.

16 Alvarez-Abrego's theory was that either MJS fell and hit his head or that  
17 RRR caused the injury to her brother. But Duralde cast significant doubt on both  
18 possibilities. First, to fracture a child's skull to that degree would require a 10 or  
19 20 foot drop, nearly impossible inside their apartment. Second, that type of  
20 fracture occurs only "one percent of the time" from falls of the type that Alvarez-  
21 Abrego suggested occurred. RP (June 9, 2008) at 42. Third, the oldest child at  
22 the apartment with Alvarez-Abrego, four year old RRR, was likely not strong  
23 enough to lift her brother and apply sufficient force to fracture his skull in that  
24 fashion. And Rondeau testified that she had never seen RRR carry MJS. Finally,  
25 the room where Alvarez-Abrego claims MJS fell was carpeted, further reducing  
26 the possibility of an accidental injury. Therefore, we hold that any constitutional  
error was harmless.

Nonconstitutional error in admitting hearsay evidence requires reversal  
only if it is reasonably probable that the error materially affected the trial's  
outcome. *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Consistent  
with our holding that the constitutional error was harmless, we hold that  
admission of the hearsay statement in violation of ER 803(a)(4) was unlikely to  
have materially affected Alvarez-Abrego's conviction was, therefore, harmless.

See ECF No. 20, Exh. 7, pp. 17-18.

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L.  
No. 104-132, 110 Stat. 1214 (1996), the federal courts must defer to a state court's determination  
of harmless error "unless it was in conflict with the reasoning or the holdings of [United States

Supreme Court] precedent or if it applied harmless-error review in an objectively unreasonable manner.” *Inthavong v. Lamarque*, 420 F.3d 1055, 1058-59 (9th Cir.2005) (internal quotation marks omitted). If a federal court concludes under AEDPA that the state court’s determination of harmless error was contrary to United States Supreme Court precedent or objectively unreasonable, then no deference is owed, and the federal court is to apply an independent harmless error analysis under *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). *Id.* at 1059. Therefore, “[t]o grant relief where a state court has determined that a constitutional error was harmless, [a federal court] must both determine (1) that the state court’s decision was contrary to or an unreasonable application of Supreme Court harmless error precedent, and (2) that the petitioner suffered prejudice under *Brecht* from the constitutional error.” *Id.* Under *Brecht*, a constitutional error at trial will not warrant habeas relief unless the violation in question “had substantial and injurious effect or influence in determining the jury’s verdict.” *Brecht*, 507 U.S. at 637-38. “Evidence erroneously admitted in violation of the Confrontation Clause must be shown harmless beyond a reasonable doubt, with courts considering the importance of the evidence, whether the evidence was cumulative, the presence of corroborating evidence, and the overall strength of the prosecution’s case.” *United States v. Bowman*, 215 F.3d 951, 961 (9th Cir.2000) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)). A violation of a defendant’s confrontation rights is subject to harmless error analysis because its effect can be “quantitatively assessed in the context of other evidence presented” to the jury. *Winzer v. Hall*, 494 F.3d 1192, 1201 (9th Cir.2007) (citing *Arizona v. Fulminante*, 499 U.S. 279, 308, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)).

Here, as the Washington Court of Appeals correctly noted, the non-hearsay evidence



1 that Mr. Alvarez-Abrego assaulted the six-month old infant was overwhelming. MJS was injury  
2 free when his mother, Ms. Rondeau, left him and her other children in the sole care of Mr.  
3 Alvarez-Abrego. RRR, the oldest child at the apartment with Mr. Alvarez-Abrego was only four  
4 years old at the time. ECF No. 20, Exh. 13, p. 78. When Ms. Rondeau returned, Mr. Alvarez-  
5 Abrego concealed MJS from her by grabbing him and keeping him in the stroller. Ms. Rondeau  
6 also noticed that Mr. Alvarez-Abrego was acting in an unusual manner toward MSJ. *Id.*, pp. 78-  
7 80. When Ms. Rondeau finally saw MJS, his head was grossly swollen, pushing his scalp away  
8 from his skull and changing the placement of his left ear. *Id.*, pp. 81-81. Ms. Rondeau's oldest  
9 child verified that Mr. Alvarez-Abrego would swing MJS around by his ankles when Ms.  
10 Rondeau was not there. *Id.*, pp. 92-93. A neighbor heard MJS give a sickly, painful cry that  
11 quickly stopped. *Id.*, pp. 63-64. The medical evidence indicated prior child abuse and non-  
12 accidental injury. The medical evidence also refuted Mr. Alvarez-Abrego's theory that MJS fell  
13 and hit his head or that RRR caused the injury to her brother. The evidence indicated that to  
14 fracture a child's skull to the degree of injury suffered by MJS would require a 10 to 20 foot  
15 drop, which was nearly impossible inside their apartment, that type of fracture occurs only one  
16 percent of the time from the type of fall Mr. Alvarez-Abrego was suggesting, that the room  
17 where MJS fell was carpeted further reducing the possibility of an accidental injury, and that the  
18 four year old RRR was likely not strong enough to lift her brother and apply sufficient force to  
19 fracture his skull in a manner consistent with his injuries. ECF No. 20, Exh. 13, pp. 40-44.

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23 The Washington Court of Appeals concluded that even disregarding the doctor's ultimate  
24 conclusion that "the history that fit[] his injury was that he had been thrown against the wall," the  
25 overwhelming evidence shows, that as sole caretaker during Rondeau's absence, Alvarez-Abrego  
26 caused the trauma to MJS." ECF No. 20, pp. 17-18 (*citing* RP (June 9, 2008) at 40-41.



1 The Washington Court of Appeal's determination that the trial court's Confrontation Clause  
2 error was harmless was not in conflict with United States Supreme Court precedent or  
3 objectively unreasonable. The undersigned finds no prejudice under *Brecht*. The non-hearsay  
4 evidence against Mr. Alvarez-Abrego was overwhelming and pointed to his guilt. His attempts  
5 at trial to conjecture that MSJ's injuries were caused by a fall or by the four year old RRR were  
6 unpersuasive and contradicted by medical evidence. Accordingly, the undersigned finds that the  
7 state court's determination of these issues was not contrary to or an unreasonable application of  
8 clearly established federal law. Mr. Alvarez-Abrego's second and third claims should be denied  
9 and dismissed with prejudice.  
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#### 11 **CERTIFICATE OF APPEALABILITY**

12 A petitioner seeking post-conviction relief under 28 U.S.C. § 2254 may appeal a district  
13 court's dismissal of his federal habeas petition only after obtaining a certificate of appealability  
14 from a district or circuit judge. A certificate of appealability may issue only where a petitioner  
15 has made "a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. §  
16 2253(c)(3). A petitioner satisfies this standard "by demonstrating that jurists of reason could  
17 disagree with the district court's resolution of his constitutional claims or that jurists could  
18 conclude the issues presented are adequate to deserve encouragement to proceed further."  
19  
20 *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

21 Under this standard and based on a thorough review of the record and analysis of the law  
22 in this case, this court concludes that Mr. Alvarez-Abrego is not entitled to a certificate of  
23 appealability with respect to this petition.  
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1 **CONCUSION**

2 Based on the foregoing discussion, the undersigned recommends that Mr. Alvarez-  
3 Abrego's habeas petition be **denied**, and this action **dismissed with prejudice**.

4 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil  
5 Procedure, the parties shall have fourteen (14) days from service of this Report and  
6 Recommendation to file written objections. See also Fed. R. Civ. P. 6. Failure to file objections  
7 will result in a waiver of those objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140  
8 (1985). Accommodating the time limit imposed by Rule 72(b), the Clerk is directed to set the  
9 matter for consideration on **February 4, 2011**, as noted in the caption.  
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11  
12 DATED this 18th day of January, 2011.

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15 Karen L. Strombom  
16 United States Magistrate Judge  
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